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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

FEDERAL COMMUNICATIONS COMMISSION

In re Applications of WASHINGTON, D.C.)20554

EB 10

PENINSULA COMMUNICATIONS, INC.
FM Translator Stations

K274AB, Kodiak, Alaska)	BRFT-951124ZH
K285AA, Kodiak, Alaska)	BRFT-951124JZ
K285EF, Kenai, Alaska)	BRFT-951124UT
K272DG, Seward, Alaska)	BRFT-951124ZG
K285EG, Seward, Alaska)	BRFT-951124ZK
K283AB, Kenai & Soldotna, Alaska)	BRFT-951124YU

For Renewal of Licenses

To: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Peninsula Communications, Inc. ("Peninsula"), through counsel, and pursuant to Section 1.115(d) of the Commission's Rules, hereby submits its opposition to the Application for Review filed on October 10, 1996, on behalf of Glacier Communications, Inc. , KSRM, Inc., Cobb Communications, Inc. and King Broadcasters, Inc. (collectively "Petitioners"), seeking review of the ruling of the Chief, Audio Services Division ("Chief, ADS") by letter dated September 11, 1996 (the "Ruling"). A copy of the Ruling is attached hereto as Attachment 1. In support of the foregoing, the following is stated:

I. Background.

The Audio Services Division Ruling was in response to separate petitions to deny Peninsula's above-captioned translator renewal applications (hereinafter collectively referred to as the "Translators") and certain other translator renewal applications filed by Peninsula that are not a subject of the instant

Application for Review.

The factual background, as summarized at page 5 of the Ruling, is as follows:

"...over the years the staff has granted Peninsula authority to construct a number of non fill-in translator stations. The current authorizations for four of these stations (K257DB, Anchor Point, K265CK, Kachemak City, K272CN, Homer and K285AA, Kodiak) were issued during the 1980's, prior to the Commission's revision of the translator ownership rules in 1990. For three of these four stations (K257DB, K265CK, and K272CN), Peninsula requested a waiver of former Section 74.1232(d). For the fourth station (K285AA) Peninsula did not seek any waiver. The most recent construction permits and licenses for the five remaining non fill-in stations (K283AB, Soldotna, K274AB, Kodiak, K285EF, Kenai, K272DG, Seward, and K285EG, Seward) were granted following adoption of the revised rules. For these five stations, Peninsula's attorney submitted a cover letter requesting waiver of the existing processing freeze but made no specific request for waiver of the revised ownership rules. Despite the absence of a waiver request, the staff, on its own motion, issued a letter ruling specifically waiving revised Section 74.1232(d) for the two new translator stations serving Seward."

Based on the facts as summarized above, the Ruling concluded that Peninsula's continued operation of translator stations K257DB, K265CK, K272CN, K274AB, K283AB, K285AA and K285EF, subsequent to June 1, 1994, was in violation of the amended Section 74.1232(d) of the Commission's Rules¹. The Ruling further determined that "...because of the unique circumstances present here, we have determined that the appropriate sanction for these violations at this point is an admonition, not a monetary forfeiture or adverse action on the renewal applications."

¹Each of the licenses for the Translators, as issued by the Commission, specifically provided that the license would not expire until April 1, 1996.

Accordingly, the Ruling directed that Commission action with respect to the subject renewal applications would be deferred for a period of sixty days from the date of the Ruling (September 11, 1996) during which time Peninsula must file applications to assign all non fill-in translators to unaffiliated parties in compliance with Section 73.1232(d) and (e) of the Commission's Rules. The Ruling further provides that if any such assignment applications are granted, the license renewal applications will be granted conditioned upon consummation of the assignments. In the event an assignment application for any non-complying translator is not filed within this 60 day period, the Ruling provides that the Commission will take appropriate action against the renewal application of that station.

Following the issuance of the Ruling, Peninsula determined not to seek review or reconsideration of the Ruling³. In this regard, it is Peninsula's intent to comply in all respects with the Ruling by the Chief, ASD, and to file appropriate assignment applications to divest its interest in the subject non fill-in Translators within the sixty day required time frame.

II. The Application for Review.

On October 10, 1996, Petitioners filed their Application for Review of the Ruling, claiming, inter alia, that the Chief ASD erred "...in both not ordering the immediate cessation of operation by the Translators and not denying Peninsula's

³Peninsula believes and continues to maintain that it has at all times acted in good faith and operated the Translators pursuant to the FCC licenses that were issued by the Commission and in accordance with the waivers and authorizations referred to herein.

applications for renewal of the licenses for the Translators".

Petitioners claim that review of the Ruling is warranted because:

(i) The failure of the Chief, ASD to order Peninsula immediately to cease operation of the Translators based upon its conclusion that their operation is in direct conflict with Section 74.1232(d) and case precedent and amounts to an abdication of the responsibility of the ASD to enforce compliance with the Commission's rules;

(ii) The directive that Peninsula divest itself of Ownership of the Translators is contrary to the Communications Act and Commission Policy.

III. Discussion.

With respect to Petitioners' claim that the Chief, ASD, erred in failing to order Peninsula to immediately cease operation of the subject translators, there is no language in Section 74.1232(d) of the Commission's Rules, as amended, that provides for such a sanction in the event of non-compliance with that rule. Indeed, a review of the Commission's Rules indicates that such a sanction must be evoked pursuant to an order to show cause issued by the Commission under Section 1.91 of the Commission's Rules. In the instant case there has been no finding that Peninsula has willfully acted in bad faith or that the public health, interest or safety is otherwise involved. To the contrary, the Ruling specifically acknowledged that "...treatment of Peninsula's various translator applications has not been entirely consistent, nor the reasons underlying various actions explicitly stated. Under those circumstances, we do not believe a fine or immediate adverse action against the renewal applications would be equitable."

Nevertheless, the Ruling makes the clear determination that Peninsula must come into compliance with the revised Section 74.1232 of the Commission's Rules and that a prospective waiver of the divestiture requirement set forth in revised 74.1232 was not warranted. Contrary to Petitioners' argument, this determination by the Chief, ASD, is entirely consistent with the ASD determination in Kevin C. Boyle, Esq., 11 FCC Rcd 2348, (Audio Services Div., MMB, 1996). In that case the Chief, ASD, denied a request for a waiver sought by the assignee of a full-service station for non fill-in translators associated with the station and owned by the assignor. The Chief further determined that the assignor, upon assignment of the primary station, could continue to operate the translators so long as it did not receive financial support from the new licensee of the full-service station or, alternatively, could seek to assign the translators to another qualified applicant. In the instant case, as in Kevin C. Boyle, Esq., the Chief, ASD, has denied Peninsula's request for a further waiver and directed Peninsula to divest pursuant to revised Section 74.1232(d) of the Commission's Rules.

Based on the foregoing, and the finding that Peninsula "could have reasonably, albeit mistakenly, believed" that the Commission had granted it waivers of Section 74.1232(d), the sixty day divestiture Ruling by the Chief, ASD, is consistent with both the requirements of revised Section 74.1232(d) and Commission precedent as set forth in Kevin C. Boyle, Esq., supra. Accordingly, Petitioners' claim that the Chief, ASD, erred in failing to order Peninsula to "...immediately to cease operation

of the Translators..." must be rejected.

Petitioners' claim that the Chief, ASD's divestiture directive is "...contrary to the Communications Act and Commission policy" is similarly without merit and should also be rejected. In presenting this argument, Petitioners make no specific reference whatsoever to provisions of the Communications Act or "Commission Policy". Rather, Petitioners' argument is based on the bald assertion that, subsequent to June 1, 1994, Peninsula's licenses for the subject Translators "...effectively terminated by operation of law...". Petitioners further argue that "assuming, arguendo" that this is not the case, the Commission cannot permit Peninsula to divest unless it first finds that the subject Translator renewal applications may be granted. Petitioners fail to cite any authority whatsoever for this creative and self-serving interpretation of the law.

Peninsula submits that revised Section 74.1232(d) of the Commission's Rules, by its terms, required primary stations to divest any translators that were not in compliance with the newly revised ownership rules by June 1, 1994. Non-compliance, absent a waiver (which Peninsula maintains that it had duly obtained from the Commission) would constitute a violation of the revised rule. However, there is no provision in revised Section 74.1232(d) declaring that any violation of that rule would result in the immediate and automatic expiration of an outstanding translator license without further Commission action. In addition, Section 1.62 of the Commission's Rules specifically provides, inter alia, that where, as here, there is pending

before the Commission at the time of expiration of a license a proper and timely filed application for renewal, such license shall continue in effect without further action by the Commission "...until such time as the Commission shall make a final determination with respect to the renewal application...". See Section 1.62(a)(1) of the Commission's Rules. Moreover, as noted above, each of the licenses in question as issued by the Commission specified that it was in full force and effect until the end of the license term, April 1, 1996. Peninsula received no direct notification from the Commission that the license term as specified on each of the translator licenses was modified to a date other than April 1, 1996.

IV. Conclusion

Petitioners' unsupported and meritless claims to the contrary notwithstanding, the Ruling by the Chief, ASD, is, by its terms and as further discussed above, fully consistent with applicable Commission rules, policy and precedent. As noted above, Peninsula intends to fully comply with the Ruling by filing applications for assignment of the Translators with the Commission within the time frame set forth therein. Accordingly, review of the Ruling, as requested by Petitioners, should in all respects be DENIED.

Respectfully submitted,


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Dated: October 25, 1996

ATTACHMENT 1

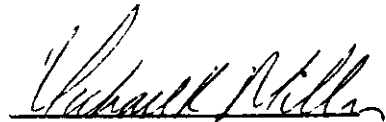
CERTIFICATE OF SERVICE

I, Michael R. Miller, do hereby certify that a copy of the foregoing **Opposition to Petition for Review** was sent this 25th day of October, 1996, by United States first-class mail, postage pre-paid, to:

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